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MAY CONGRESS LEVY MONEY EXACTIONS, DESIGNATED "TAXES," SOLELY FOR THE PURPOSE OF DESTRUCTION?

THE questions of taxation have furnished a cause of warfare, armed or wordy, since the meaning of government has been known. The possibility of our Constitution was due, superficially, to the imposition of a tax; its adoption, in great measure, to the absence of a tax, to the lack of a taxing power in the Confederation. Since the adoption of the Constitution with its grant of a taxing power, much of our legislative disagreement has centered on the interpretation of that grant. The case of *McCray* v. *United States*,[1] opens up a comparatively untrammeled field of dispute. The basis of the case is an act of Congress taxing the production of colored oleomargarine. The Act of 1886[2] having defined oleomargarine, as used in the act, declared, after various other provisions, "that upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of two cents per pound, to be paid by the manufacturer thereof * *." A later act was passed in 1902[3] upon the same subject. It in many respects expressly amended the act of 1886, the provisions in point being a decrease in the tax on uncolored oleomargarine from 2c to ¼c per pound, and an increase to 10c per pound on that which was in any way colored to resemble butter. This rendered the cost of production so high as absolutely to preclude sale of the product; consequently did away entirely with the traffic in colored oleomargarine, and became quite impotent for the production of revenue.

[1] (1904), 195 U. S. 27.
[2] 24 Stat. 209.
[3] 32 Stat. 193.

The constitutional validity of the imposition was attacked in the courts on various grounds, the chief among them being the right of Congress to levy a tax having for its object not revenue, but destruction. The court held that, in as much as Congress could constitutionally levy a tax on oleomargarine, it might make the amount thereof whatsoever it choose; and that the judiciary could not constitutionally inquire into the intent of Congress, although the effect of the tax was destruction, it being on its face a valid tax.

If this decision is correct, it marks a fresh score for the federal government against the strict constructionists and states rights exponents. If Congress, under its granted general power to lay and collect taxes, duties, imposts, and excises, may regulate and destroy the production of colored oleomargarine because it is deleterious to health, or on other grounds, it may regulate and destroy other productions on the same grounds. The agitation for individual state action requiring the exposition of ingredients on the labels of patent and proprietary medicines is, in that event, misdirected, since the national legislature may itself tax out of existence medicines not so labeled. The proposed law forbidding interstate transportation of child-made manufactures is uselessly weak if Congress may absolutely prevent their production by a tax. So the recent "Pure Food Law" might have reached beyond interstate traffic in adulterated articles if a prohibitive imposition had been laid upon them.

The only case on all fours with the *McCray* case is that of *Cliff* v. *United States*.[4] So it appears that the correctness of the discussion to be must depend on reasoning from precedented principles rather than the authority of full and precise precedent cases.

The most obvious and the broadest ground on which to base an objection to the validity of the imposition is a denial of the right of Congress to lay any tax at all upon colored oleomargarine. If no such right exists in the federal government, clearly the imposition not only of 10c but of the original 2c per pound was void. But such an objection is wholly without weight in the face of decision,[5] and the question has been too thoroughly settled in favor of the right of Congress to levy a tax on the production of oleomargarine to admit of further discussion here.

[4] (1904), 195 U. S. 159, 25 Sup. Ct. Rep. 1.

[5] Patton *v.* Bradley (1901), 184 U. S. 608, 619; Nicol *v.* Ames (1898), 173 U. S. 509; In re Kollock, (1896), 165 U. S. 526. In the License Tax Cases (1866), 5 Wall. 463, 471, the court says: "It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution with only one exception and only two qualifications * * *. Thus limited and thus only it reaches every subject and may be exercised at discretion." The case determined the right of the national government to tax the sale of liquor and the maintenance of lotteries, and is, by analogy, an authority to the effect that a tax on oleomargarine is legitimate. The similar tax on the production of alcohol is beyond doubt as to its validity.

But if there can be no question of the right of Congress to tax colored oleomargarine, the only cavil with the decision in point must be on the ground that Congress has not, with the right to lay a tax on oleomargarine, the right also to destroy or regulate it thereby, regardless of revenue. There was no use made in the *McCray* decision of any supposition that Congress might by direct legislation have controlled or destroyed the industry, or in terms have forbidden the production of colored oleomargarine; and indeed it was implied that Congress had no such power. The right to govern the internal trade of the states, and hence directly to prohibit the manufacture of oleomargarine, does not belong to the United States, and for the purpose of this discussion it may correctly be considered that Congress could not constitutionally have controlled by direct legislation or, in terms, have forbidden the production of colored oleomargarine.[6] The constitutionality of its destruction must be supported, if at all, by the constitutional grant to Congress of the right to lay and collect taxes, duties, imposts, and excises. As the imposition results in no revenue and is, in effect, a regulation and prohibition,—an end not constitutionally to be reached by direct legislation nor under other granted powers,—there arises an inquiry as to whether such an end may legitimately be sought under cloak of the granted power to tax, or whether such an aim is not an overstepping of the spirit and intent of that grant.

In its vulgate use the name tax is applied to all money impositions of government, fees not being included under the name of impositions. And in legal parlance the term is frequently as broad and comprehensive. But technically there is a distinction; revenue from imposition is one thing, regulation by imposition another, and in the narrower and proper sense of the word both impositions are not taxes. The incidental, to be sure, often looms larger than the principal; and a true tax often regulates. But properly speaking an imposition purely for regulation is not a tax. The definitions of a tax, formulated by jurists and others, support the distinction, as the purpose of revenue is emphasized, regulation ignored and tacitly excluded.[7]

[6] "As a police regulation relating exclusively to internal trade of the states, it can only have effect where the legislative authority of Congress excludes, territorially, all state legislation, as, for example, in the District of Columbia." United States *v.* DeWitt (1869), 9 Wall. 41. See, also, In re Application of Jacobs (1885), 98 N. Y. 98; People *v.* Marx (1885), 99 N. Y. 377; License Cases (1847), 5 How. 504, 574; Passenger Cases (1849), 7 How. 283, 399; License Tax Cases (1866), 5 Wall. 462, 470; Leisey *v.* Hardin (1889), 135 U. S. 101, 127; Bridge Co. *v.* Kentucky, (1893), 154 U. S. 204; Plumley *v.* Mass. (1894), 155 U. S. 461. Hare's Am. Const. Law, Vol. 2, p. 773.

[7] "A tax is understood to be a charge, a pecuniary burden, for the support of government." United States *v.* Railroad Co. (1872), 17 Wall. 322. "Taxation in the ordinary sense means the act or process of apportioning or assessing, and of collecting or gathering

The distinction is not unanimously accepted, however, as witness Professor Seligman of Columbia University, who earnestly contends[8] that the alleged distinction between taxation and police regulation by means of money exactions is purely a fiction, arising through faulty economic analysis on the part of the judges. It is, he says, the result of attempts to uphold under the fabrication of a "police power" certain assessments which would not have been valid under the power to tax possessed by the assessor. Yet while maintaining that there is economically no division, he still recognizes the existence of a legal distinction: necessarily recognizes it since it appears in the cases and legal text books, and since time and again levies have been confirmed or held invalid on the ground that they came under one power or the other alone. Judge COOLEY, who is quite as eminent a writer on the legal aspect of taxation as Seligman on the economic side, says: "There are some cases in which levies are made and collected under the general designation of taxes * * * where the imposition of the burden may fairly be referred to some other authority than to that branch of the sovereign power of the state under which the public revenues are apportioned and collected. * * * This manifestation of the sovereign authority is usually spoken of as the police power. The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance."[9] This is sustained in the cases, and the last sentence in particular quoted in *Philadelphia* v. *Penna. Hospital.*[10] Again he says:[11] "The grant of authority to impose fees for the purpose of revenue would not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose."

The case of *Oil City Trust Co.* v. *Oil City*[12] was an action to collect a so-called license fee of $50 per annum laid upon banks by the

from a people a portion of their property for the use and support of the government and for all public needs." Cyclopedia of Polit. Science, Polit. Econ. and U. S. Hist., p. 871. In Hanson *v.* Vernon (1869), 27 Iowa 28, the court said: "What are taxes? * * * I answer that by the concurrent opinion of lawyers, judges, lexicographers, and political economists, as well as by the general and popular understanding, taxes are burdens or charges imposed by the legislature upon persons or property, to raise money for public purposes, or for some governmental end." The later exemplification makes it perfectly clear that "to accomplish some governmental end" is to be read with "to raise money" not with "charges imposed." Many definitions are here collected, all, in substance, "A tax is a portion of the property of individuals which is taken from them by the government and disposed of by it." Am. & Eng. Encyc. of Law, Vol. 22, p. 917. "The police power must also be distinguished from the taxing power, and the distinction is this: that the taxing power is exercised for the raising of revenue, while the police power is exercised only for the purpose of promoting the public welfare * * *."

[8] Essays in Taxation, p. 269.

[9] Cooley on Taxation, 3d ed., Vol. 2, p. 1125.

[10] (1891), 143 Pa. St. 367.

[11] Ib., p. 1140.

[12] (1892), 151 Pa. St. 454.

municipality under legal power to levy a license tax. The court, recognizing this distinction, said: "Is the charge in controversy a tax or is it a license fee under the police regulation? If it be a tax for revenue the plaintiff can not recover, whether it be deemed a tax or a license fee. The taxing power is to be distinguished from the police power, and the power to license and regulate particular branches of business or matters is usually a police power, but when license fees or exactions are plainly imposed for the sole and main purpose of revenue, they are in effect taxes." And again (p. 458); "'The shares * * * shall be exempt from all other taxation under the laws of this commonwealth.' The word taxation here is used in its usual and proper meaning of a charge for the support of the state or some of its subordinate municipal agencies, and clearly does not refer to a charge merely incidental to the exercise of a police power."

In the case of *Morton* v. *Mayor, etc., of Macon*[13] the municipality had been empowered by statute to levy and collect a license tax on certain occupations, including money lending, but was not given specific authority to regulate or prohibit them. It laid an annual tax of $500 upon money lenders, which tax was proved to be prohibitory. The court said, on suit to prevent the collection, "There is a very wide difference between a power to license an occupation with a view to regulation and a power to tax it for the sole purpose of raising revenue," and held that the empowering statute gave the right to lay a tax for revenue but not for police purposes, and that the levy, being prohibitory, was not a tax for revenue. They approved, on this point, the similar case of *Fretwell* v. *Troy*.[14] In a later Kansas case,[15] where a tax of $500 per year on all druggists selling intoxicating liquors had proved prohibitory, it was held void on the ground that a city having authority to license for revenue could not, under that statute, prohibit also.[16]

In all cases noted, the suit arose over the action of municipalities, not of sovereign governments, the reason being that municipal powers are only such as are granted by the states. The sovereign state government, on the other hand, being sovereign, is free to tax

[13] (1900), 111 Ga. 162.

[14] (1877), 38 Kan. 271.

[15] City of Lyons *v.* Cooper (1888), 39 Kan. 324.

[16] On this point bear, also, Desty on Taxation, Vol. 3, p. 305; Ex parte Gregory (1886), 20 Tex. Ct. of App. 210; Ellis *v.* Frazier (1901), 38 Ore. 462, 63 Pac. 642; Gilson *v.* Munson (1897), 114 Mich. 671; Chilvers *v.* People (1862), 11 Mich. 43; Ash *v.* People (1863), 11 Id. 347; Phila. *v.* Penna. Hospital (1891), 143 Pa. St. 367; Edye *v.* Robertson (1884), 112 U. S. 580; In re Win Yan (1885), 22 Fed. 701 (not in state reports); Sweet *v.* City of Wabash (1872), 41 Ind. 7; Braun *v.* City of Chicago (1884), 110 Ill. 186; State, Benson, pros., *v.* Mayor, etc., of Hoboken (1869), 33 N. J. L. 280.

or regulate by money impositions at will and no questions would be likely to develop as to the specific power under which the burden is imposed. But the question does arise from federal impositions, because the federal power is also granted, not inherent. It is, of course, a truism that the federal government may exercise only those powers which were granted to it; it has none inherent. Unless given, expressly or impliedly, under one clause or another of the Constitution, the power here exercised by Congress is void.

Were the law in point for revenue, and not an attempted regulation and control, there would be no question of validity. But in fact it creates no revenue. Under the authorities supra, distinguishing taxes and regulations, it assumes the elements of a purely regulatory act. That it is called a tax is in no way determinate.[17] But, not to delay too long on a preliminary point, the act is impliedly recognized in the *McCray* case itself as being in effect a regulation, and it may be taken without further discussion that the law is in fact, and in operation and, for present consideration, in intent, an act for regulaton, not revenue.

This brings us squarely to the question of *McCray* v. *United States*. Does the grant to Congress of power to "lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defense and general welfare of the United States" give it a power of control, as such, by money exactions, over affairs whereof jurisdiction is not otherwise conferred? Are the terms, taxes, duties, imposts and excises, as used in the Constitution, broad and inclusive of all money exactions, those aiming solely at control as well as those for revenue; or are they relative only to enrichment of the government? If the power conferred is broad enough to cover regulation, may the taxing power be used for any purposes not included within the other enumerated powers? If it may be so used, is the right of regulation co-extensive with the taxing power?

[17] Said MOORE, J., in Ellis *v.* Frazier, supra, p. 466, "As a preliminary matter it is important to consider whether the burden thus imposed upon bicycle owners is a tax or a license." "The legislative assembly has referred to the levy as a tax, but the descriptive designation is unimportant, for the object sought to be obtained by the enactment must determine the character of the enactment." "Custom," says Judge COOLEY, "has much to do in determining whether certain classes of exactions are to be regarded as taxes or as duties imposed for regulation. If by the common understanding and general custom of the country, a particular duty is regarded as being imposed upon certain individuals, not as their proportionate share of the burdens of government, but because of some special relation * * * to a business particularly troublesome or dangerous * * * there is no sufficient reason why this may not be considered a mere police regulation, though the proceedings assume the form of taxation and are even designated by that name." (Cooley on Taxation, 3d ed., vol. 2, p. 1127.) The distinction between proportionate shares of the general burden and relation to a dangerous or obnoxious business is, in its application to the oleomargarine act, obviously exact.

Logically, the comprehensiveness of the terms used in the Constitution is of primary consideration. The common meaning of the expressions used, the reason for the grant, the part of the Articles of Confederation whose place it took, the mischief to be remedied, the presumptive intent and purposes of the provision must furnish the interpretation; results, custom, and harmony with the other grants, a verification thereof. Judge STORY in his commentaries on the Constitution takes the view that the name of "tax" is broadly comprehensive. He does not recognize a difference in inherent powers under which various money exactions are required by sovereign governments. It is under their natural right to tax, he says, that governments, not expressly limited therein, take all or a portion, for revenue or control. This is the power, natural, full, and complete, which, he thinks, was given to Congress by the grant of a right to lay and collect taxes. Discussing the irreconcilable views as to the right of Congress to use its taxing power for purposes other than those enumerated, he concludes that, "whichever construction of the power to lay taxes is adopted, the same conclusion is sustained, that the power to lay taxes is not by the Constitution confined to purposes of revenue." At the same time he admits the existence of vigorous and unsettled opposition to his interpretation.

This opposition is strongly based on the ground that STORY'S understanding of a government's natural right to "tax" is too comprehensive. The right is more properly restricted to the defined meaning of apportioning and collecting from the people a part of their property, even unto the whole if necessary, for the use and support of the government. Undoubtedly governments did, inherently, have the right and did use money impositions as means of regulation and control. But this would seem more properly to be based on their natural right of full and complete control, to which ends the impositions were but a means. Is it not more reasonable to ascribe any pure rule of regulation to the natural power of direct control than to one under which it must be an indirection? The true right under which the power has been exercised by sovereign states has never, apparently, been the subject of legal action, hence is not settled. The power undisputed, the right from which it springs, is immaterial. Were a state unhampered in its right to tax, but by its constitution distinctly forbidden to hamper or prohibit a particular business, would a prohibitive tax thereon be sustained? Congress is not, in terms, forbidden to regulate the internal manufactures of a state, but "all powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." At any rate, whichever is the

proper import of the expression, there is indubitable cause for dispute and uncertainty.

"Where the words of the Constitution are plain and their meaning certain, there can be no doubt that in construing it we must give the words their full effect. The great object is to find out and ascertain the meaning and intent of the people in adopting the Constitution, and where the words express that meaning clearly, there can be no room for cavil or doubt. Where the words used are such as may bear two constructions, and it is a matter of doubt what construction they ought to receive, then we must resort to the means of construing it. We must examine first the reasons and objects for which the Constitution was formed and adopted, and take care that in giving a construction to it we do not thwart the great object and intention of those who framed and adopted it."[18]

The scope of the section of the Articles of Confederation corresponding to the constitutional grant of taxing power is in no way conclusive as to the extent of the latter. But it may show the mischief remedied and help to fix the intention. Section 8 of the Articles reads: "All charges of war, and all other expenses that shall be incurred for the common defense or general welfare and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state, * * *. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the United States in Congress assembled." Under this section the federal government was entirely dependent upon state action for the revenues necessary to pay its debts and to carry out the purposes of its existence. Inability to enforce state action and to collect its requisitions, and incapacity therefore to accomplish its purposes, drove the Confederation to its death and transmutation. Obviously it was the primary and controlling intention of the framers of the Constitution completely to remedy this defect in the Articles of Confederation; to substitute for the ineffectual eighth section the full and complete power in the national government to raise its needful financial resources by its own action, independent of the states. Under the Confederation, the government had no power to tax, and, of course, *no power to regulate*. Its sole purpose, in point, was properly to use the revenues given it by the states. The mischief resulted from the failure of the states to supply the national government. "In determining the extent of any given

[18] From the argument of Mr. D. B. Ogden in the Passenger Cases (1849), 7 How. 283, 294.

power the courts will if necessary look to the purposes for which it is given."[19] Clearly the object of the framers was to give the federal government the right to get for itself the revenues which the states had failed to supply, the right to lay and *collect* taxes, to secure money, the sine qua non of government. "It was a leading object in the adoption of the Constitution * * * to confer upon it (the federal government) ample power to *provide revenue* by the taxation of persons and property."[20] If this constitutional provision was meant to convey any other powers than the securing of revenue, the reason therefor is extraneous to the substance of the articles or their failure. The proposition of the breadth and comprehensiveness of the constitutional use of "tax" can not be based on this obvious intent, and no reason for other intent is apparent.

If the framers intended that the grant should convey also a right of regulating the internal affairs of the states, they gave a privilege extremely limited, in the scope of its application, by its very nature. Control by the indirection of so-called taxation is essentially of less varied capabilities than control by direct legislation. Yet the latter is in such cases as this absolutely forbidden to Congress. If the Convention had intended to give to Congress any control at all over the states' internal activities, would it not have been by direct grant, conveying readier and more useful power? Since the two are not inseparable, why should the Convention have combined with the right to raise revenues an indefinite, indirect power of but partial application? Within all reason it was the intention of the framers of the Constitution to use the words of the grant in their strict and proper meaning, and to limit its purpose to the scope of revenue.

The cases are conspicuously lacking in any discussion of the point, nor have any references thereto been discoverable, even in cases on the extent of the grant. It would appear to have been considered always as a power for revenue. Thus, in Hamilton's report, as Secretary of the Treasury, in 1791, he says: "The national legislature has power to lay and collect taxes * * * with no other qualifications than * * * uniformity, proportionality, and non-taxation of exports. * * * These three qualifications excepted, the power to raise money is plenary and indefinite. And the objects to which it may be appropriated are no less comprehensive than the payment of the public debt and the providing for the common defense and the general welfare." The whole tone is that the intended object of the power is revenue. In President Monroe's message of May 4, 1822, regarding the bill for repairs to the

[19] Gibbons *v.* Ogden (1824), 9 Wheat (*22* U. S.) 1.
[20] Veasie Bank *v.* Fenno (1869), 8 Wall. 533.

Cumberland Road, his whole attitude toward the grant of a taxing power is as toward one whose purpose is revenue, i. e., "The latter part of the clause was intended to enumerate the purposes for which *the money thus raised*[21] might be appropriated." "I indulge a strong hope that the view here presented will not be without effect, but will tend to satisfy the unprejudiced and impartial that nothing more was granted by that part (to pay the debts and provide for the common defense and general welfare of the United States) than a power to appropriate the money raised under the other part." "The grant consists, as heretofore observed, of a twofold power; the first to raise, and the second to appropriate, the public money."

Hare, in his American Constitutional Law, takes the same view as Judge STORY, and says:[22] "So taxation may be used in aid of the police power to regulate and, if possible, limit the manufacture and sale of articles which, like spirituous liquors, are regarded as prejudicial to health or morals." But it seems that he is necessarily in error here. Primarily, no police power, as such, exists in the federal government for the direct control, within the states, of "the manufacture and sale of articles * * * like spirituous liquors."[23] If their production—alcohol and similar articles—may be controlled by federal impositions, it can not be in aid of any actual police power but must stand on its own right. Furthermore, it is unreasonable, as previously observed, to suppose that if the framers of the Constitution had meant to give a "police power" they would not have definitely rather than impliedly granted it, and would not have made it apply to all matters to which such a power should, eo nomine, apply instead of to that haphazard selection only which may be reached by monetary exactions.

The better view should appear that of Mr. J. R. Tucker in his work on the Constitution of the United States.[24] In discussing the interpretation of the taxing clause he says: "It is a revenue power vested in Congress as a substitute for the eighth article of the Confederation, giving to the federal government an express power

[21] Present writer's italics.

[22] Vol. 1, p. 298.

[23] In the case of United States *v.* Dewitt (1869), 9 Wall. (76 U. S.) 41, the Internal Revenue Act of March 2, 1867, prohibiting the manufacture or sale of certain mixtures of naphtha and illuminating oils, was held to be in fact a *police regulation* relating exclusively to the internal trade of the states and, as such, to be of no constitutional operation or effect within the states. In the Passenger Cases (1849), 7 How. 283, Justice MCLEAN, said (p. 400): "All commercial action within the limits of a state, and which does not extend to any other state or foreign country, is exclusively under state regulation. Congress have no more power to control this than a state has to regulate commerce 'with foreign nations and among the several states.'" (See, also, In re Application of Jacobs (1885), 98 N. Y. 98; People of New York *v.* Marx (1885), 99 N. Y. 377.

[24] Vol. 1, p. 457.

to raise its own revenue, independent of state action; as it had been dependent on state will under the Confederation. The language imports a revenue power to lay and collect. These words are wedded and not to be divorced. Taxes are not to be laid except to be collected; revenue is the object of the grant and none other. Hence no other should be employed." Again (p. 465) he says: "Is it constitutional to use this taxing power for the purpose of suppressing a business in the country and not as a means of revenue, though some revenue may be derived from it? The answer seems to be clear, that a power granted as a means of raising revenue can not be diverted from this legitimate purpose by the indirect use of it to do what Congress has no power to do by direct taxation. (Should this not be "legislation"?) The end is not legitimate and therefore the law is not constitutional. It is true that where the law merely imposes the tax without disclosing the indirect purpose of its imposition, the courts may have no right to declare the law unconstitutional, though, if the purpose were disclosed on the face of the act, the courts would do so."

Undeniably Congress has heretofore made use of monetary exactions as effective methods of regulation or destruction pure and simple; and such impositions have been upheld by the courts. Unless these decisions, and others on the questions of taxation, can be reconciled with the reasoning and conclusion above, the latter must fail. The most notable instances of such impositions are the protective tariffs, obviously for the purpose of destroying what they purport to tax; and the tax whence arose the case of *Veasie Bank* v. *Fenno*.[25] In this case, Congress had imposed a so-called tax of 8% per annum on the circulation of notes of state banks, an imposition clearly intended to drive them out of circulation, and eminently successful therein. The validity of the imposition was, on attack, upheld by the Supreme Court.

Can such cases as these, then, and the idea of taxation for revenue only be reconciled? The answer is determined by the constitutional power under which the impositions are found to have been made. If held to be under the power to lay and collect taxes, the theory here set forth is untenable. But must they be placed under the power to tax? The Constitution gives to Congress certain other enumerated powers; among them the power "to regulate commerce with foreign nations and among the several states," and the power to regulate the coinage. In both of these instances, the power to regulate includes beyond question the power to help, hamper or destroy. The authority so given is full and unconfined as to means

[25] (1869), 8 Wall. 533.

that are constitutional. It may be exercised directly or indirectly, by embargoes or tonnage duties on the one, by prohibition or impositions on the other. This much is conceded.

In the case of the *Veasie Bank,* supra, it was on the ground of this power in Congress to regulate the coinage by indirect, as well as direct, means that the validity of the imposition was upheld. The court did, it is true, maintain that it was valid under the taxing power of Congress, and said (p. 548): "The first answer to this (the excessiveness of the tax) is that the judicial can not prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation or a class of corporations, it can not, *for that reason only,* be pronounced contrary to the Constitution." This upholds the tax, under the taxing power, but the question is passed over with little discussion and not amplified, because of what followed. It does not directly or by necessary implication concede to Congress the right, under the taxing power, deliberately to regulate by taxation, although the imposition upheld is a regulation. The case itself says (p. 541): "It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the states, *or if exercised for ends inconsistent with the limited grants of power* in the Constitution." And the constitutional grants do not include the power to regulate the internal productivities of the states.

The real ground, furthermore, on which the imposition was sustained, was the power of Congress to regulate the coinage in such constitutional ways as might seem best. The court said (p. 548): "But there is another answer, which vindicates equally the wisdom and the power of Congress. It can not be doubted that under the Constitution the power to provide a circulation of coin is given to Congress." "To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority." "Viewed in this light, as well as in the other light of a duty on contracts or property, we can not doubt the constitutionality of the tax under consideration." In discussing this case in *Edye* v. *Robertson,*[26] the court said, that the imposition "was upheld because a means properly adopted by Congress to protect the currency which it had created; namely, the

[26] (1884), 112 U. S. 580.

legal tender notes and the notes of national banks. It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple."

Judge STORY maintains, in this connection, that while Congress may make money exactions a means of executing its various powers, the right thereto lies not in implied power but in the right to regulate conveyed by the grant of a taxing power. He says:[27] "It would be no answer to say that the power of taxation, though in its nature only a power to raise revenue, may be resorted to as an implied power to carry into effect these enumerated powers in any effectual manner. That would be to contend that an *express* power to lay taxes is not coextensive with an *implied* power to lay taxes; that when the express power is given it means a power to raise revenue only; but when it is implied it no longer has any regard to this object." But STORY seemingly fails to take into consideration the narrowness of the *implied* power. It is not a power to lay taxes, a power to raise revenue, but only one of the means whereby granted powers may be executed. It is not illogical, that the right to lay money impositions and the right to raise revenue should be, the one implied, and the other express. The one would exist were there no grant of taxing power, the other only through the grant. It is not contended "that an express power to lay taxes is not coextensive with an implied power to lay taxes," but that an express power *to lay taxes* is not requisite to nor similar to an implied power *to impose money exactions* for the sole purpose of executing an express power to regulate.

Certainly the one is not necessary to the use of the other. Chief Justice MARSHALL'S effective sentence,[28] "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional," is applicable here. If the end is the execution of a granted power to control or destroy, if a money imposition is clearly adapted to securing such control or destruction, would it be prohibited or inconsistent with the letter and spirit of the Constitution did that instrument contain no grant of a taxing power?[29]

[27] Story, Constitution, Vol. 1, p. 681.

[28] M'Culloch *v.* Maryland (1819), 4 Wheat. (17 U. S.) 316.

[29] The right of Congress under its express powers to the use of money exactions as an implied power is supported by the case of Edye *v.* Robertson (1884), 112 U. S. 580, in which the validity of a federal tax, so-called, on immigration was assailed. It was argued "that the tax is not levied to provide for the common defense and general welfare of the United States, and that it is not uniform throughout the United States." But the court

If, then, the right to impose money exactions, not for revenue, may be taken as implied as an auxiliary means of effectuating certain of the expressed powers, there are apparent no cases where a federal exaction, imposed purely for purposes of control and regulation, has been sustained that can not be brought under this implied auxiliary power—saving, of course, the case in point, *McCray* v. *United States,* and the later case of *Cliff* v. *United States,*[30] which, on practically similar facts, follows the *McCray* case without discussion. The most notable and celebrated case in which a destructive federal exaction has been upheld is, probably, that of the *Veasie Bank,* already discussed, wherein the imposition was held to be under the express power in Congress to regulate the currency.

Another contended use by Congress of its taxing power for purpose of destruction is its employment of excessive tariff duties as a prohibition of imports. Whether such duties are, as a matter of fact, laid by Congress under the taxing power, is extraneous to this writing, save as the whole discussion is opposed to the right to do so. In point, at this place, is the question whether, since their constitutionality is undisputed, they might be held valid, regardless of the taxing power, under Congress' right to control commerce. From the reasoning above, and the dicta in the cases, there would seem no doubt but what such duties, solely for prohibition, not revenue, could be so sustained, as the use of an implied power, without calling in aid the taxing power. That Congress, in regulating commerce, may,

refused to sustain the contention, saying, "We are clearly of the opinion that, in the exercise of its power to regulate immigration * * * it was competent for Congress to impose this contribution." Again, in the License Tax Cases (1866), 5 Wall. 463, Congress had imposed a license tax on the selling of liquor and conducting lotteries, and it was held (p. 470), that "It is not doubted that where Congress possesses constitutional power to regulate trade or intercourse, it may regulate by means of licenses as well as in other modes." That the right to levy money impositions is implied from the other powers as an auxiliary means of effecting them is likewise strongly expressed by Chief Justice MARSHALL in Gibbons *v.* Ogden (1824), 9 Wheat. (*22* U. S.) 1. In discussing the use by the states of duties and imposts as being in effect a regulation, he says: "It is true that duties may often be, and, in fact, often are, imposed on tonnage with a view to the regulation of commerce; but they may also be imposed with a view to revenue; and it was therefore a prudent precaution to prohibit the states from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power, was no novelty to the framers of our Constitution. * * * The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty for the purpose of revenue produced a war. * * *" In the Passenger Case (1849), 7 How. 283, it was intimated not only that Congress' right to regulate commerce by means of money impositions is based upon its granted control of commerce, but also that it can not be based upon the taxing power—which extends to all subjects of jurisdiction, even the internal commerce of a state—for the court said: "But if Congress should impose a tonnage duty on vessels which ply between ports within the same state, or require such vessels to take out a license, or impose a tax on persons transported in them, the act would be unconstitutional and void."

[30] (1904), 195 U. S. 159, 25 Sup. Ct. Rep. 1.

if so desirous, absolutely prohibit it was decided a century ago in the case of *United States* v. *The William*[31] concerning the validity of the embargo laws. The court there held that under the power to "regulate" commerce, Congress had power to prohibit it partially, or consequently, completely, and said: "Further, the power to regulate commerce is not to be confined to the adoption of measures exclusively beneficial to commerce itself or tending to its advancement; but in our natural system, as in all modern sovereignties, it is also to be considered as an instrument for other purposes of general policy and interest.[32] And COOLEY,[33] seemingly taking as indisputable the validity of the law under the right to regulate commerce, says: "But a law which, under the name of taxation, has for its purpose only to embarrass and, perhaps, to destroy a certain branch of commerce * * * if enacted by the general government, would seem more properly to derive its force from the authority conferred on the government to regulate commerce, and the intercourse with foreign countries, than to an authority conferred for revenue purposes, which such a law would not tend nor aim to subserve."

Party lines are today formed by the conflict over the *advisability* of prohibiting imports, but the constitutionality of the prohibition, under the power in Congress to regulate commerce, is settled. STORY has threshed out the arguments at length to the conclusion that the power to regulate commerce includes the right to prohibit it in part, for the protection of manufactures or otherwise.[34] "Besides," he says, "the power is to regulate commerce. And in what manner to regulate it? Why does the power involve the right to lay duties? Simply because it is a common means of executing the power. If so, why does not the same right exist as to other means equally common and appropriate?" And he answers that the same right does exist: that the right to employ prohibitive duties is an incident of the power to regulate commerce, not the power itself. In other words, Congress may, under its power over commerce, destroy it in part, adopting, under that power, prohibitive duties as a means to that end.[35]

Possibly one of the most widely quoted cases in point, and one relied upon by the court in the *McCray* decision, is that of *M'Culloch* v. *Maryland*,[36] wherein Chief Justice MARSHALL said, "The power to tax involves the power to destroy." The case arose over the right

[31] (1808), Fed. Case No. 16700, 28 Fed. Cas. 614.
[32] See, also, Louisiana *v.* Kennedy (1867), 19 La. Ann. 397.
[33] Taxation, p. 12.
[34] See discussion in Story on the Constitution, Vol. 2, § 1080.
[35] See, also, People *v.* Co. Gen. Transatlantique (1882), 107 U. S. 59.
[36] (1819), 4 Wheat. (17 U. S.) 316.

of the state of Maryland to tax the Bank of the United States. The court denied the right on the ground that the power to tax is a weapon of destruction, and there was no authority in the state over the existence of the bank. The opinion is, in epitome, to the effect that (p. 486), "The people of a state, therefore, give to their government the right of taxing themselves and their property, and as the exigencies of government can not be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative to guard them against its abuse." "All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation." "The power to tax involves the power to destroy." Therefore the agencies whereby the purposes of the federal government are carried out should be, and are, exempt from state taxation.

It is on this case that are based many of the strongest arguments for complete control in Congress by taxation, in its fullest sense. But does the opinion authorize this? Does it signify that the federal government may use its power of taxation for regulation, pure and simple? Rather, the sense of the opinion is that, as sovereign state governments may be pressed for money, each may take from its people a portion of their possessions: that this right may be exercised again and again, until the whole of the property has been exhausted. In this sense there is a like right in the federal government to destroy. Further, the eminent Chief Justice was arguing negatively—against the validity of a noxious tax. It is an extremely far cry to declare from this a positive argument upholding the validity of a federal exaction, nominated a tax, though aimed not at revenue, but at destruction. It is true that Congress may not constitutionally tax the agencies of state sovereignty lest their effectiveness be destroyed. But it need not be a power in Congress deliberately to destroy which gives this exemption. It exists, in fact, an exemption from all federal taxation, not lest those agencies be destroyed outright but because, under a tax, a purely revenue tax, undoubtedly constitutional, their effectiveness might be negatived. With this view, the holding of the court in *United States* v. *Railroad Co.*[37]—that the revenues of a municipal corporation may not be taxed by the federal government—is reconcilable and not inconsistent.

To return, then, from this general proposition to the specific question, was the case of *McCray* v. *United States* correctly decided? The court therein, having determined the power in Congress to

[37] (1872), 17 Wall. 322.

destroy by means of money exactions, held that where Congress is in the exercise of a lawful power, the judiciary has not authority to inquire into the intent and the lawfulness of the purpose, (p. 59) "Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution, knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise."

But, to recapitulate the principles above, money exactions for purposes of regulation are distinguishable from money exactions for purposes of revenue; both are not, of necessity, included in a power to "tax." It is a proper presumption, under all the circumstances, that the framers of the Constitution, in giving to Congress the right to lay and collect taxes, included therein the latter alone, and there are no decisions and no uses in conflict therewith. Consequently, a federal imposition laid under the name of a tax but solely for the purpose of unconstitutional regulation, is outside the power of Congress, and invalid.

Whether, in such a case, the court could determine the intent of the legislature as to revenue or regulation from the effects of the imposition is another question, extraneous to the scope of this discussion. Can the judiciary so determine, the decision in *McCray* v. *United States* should have been against the validity of the tax. It was in effect a regulation and, as such, unconstitutional, and "Should Congress, in the execution of its powers, adopt measures which are prohibited; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."[38]

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[38] M'Culloch *v.* Maryland, 4 Wheat. 316.